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No. 02-1672

IN THE
Supreme Court of the United States

RODERICK JACKSON,

PETITIONER,

v.

BIRMINGHAM BOARD OF EDUCATION,

RESPONDENT.

On Writ of *Certiorari* to the United States Court of Appeals for the Eleventh Circuit

AMICUS CURIAE BRIEF OF COLLEGE SPORTS COUNCIL IN SUPPORT OF NEITHER PARTY

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae College Sports Council ("CSC"), a nonprofit corporation headquartered in Washington, D.C., is an umbrella organization that promotes the preservation and expansion of educational ideals, athletics, and the interests of those who sponsor, participate in, or attend such athletics. Through its institutional and individual members, CSC represents tens of thousands of student-athletes, coaches, coaching associations, booster groups, alumni, and schools nationwide.

This litigation raises important questions for CSC's members and for CSC's mission: not only whether the law should protect coaches and other educators who champion the rights of the students in their charge, but also whether litigation is the best, or at least the first, way to resolve disputes.

ISSUE PRESENTED

This case poses one purely legal issue: does Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 ("Title IX"), impliedly create a private right of action under which an educator can challenge retaliatory actions

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the timely filing of all *amicus curiae* briefs in this matter. The parties' letters of consent have been lodged with the Clerk of the Court.

taken by a federally funded school for his or her advocacy about perceived gender discrimination against students?

SUMMARY OF ARGUMENT

> It is a worthy thing to fight for one's freedom; it is another sight finer to fight for another man's.
>
> Mark Twain[2]

At the motion-to-dismiss phase, courts and parties alike must assume that Coach Jackson advocated for his team for the best of reasons and in the most unobjectionable of ways. The nobility of his pre-litigation actions, however, does not guarantee the justiciability of his retaliation claim. Moreover, by initiating litigation without first filing an administrative complaint, Coach Jackson materially altered the terms to which the Birmingham Board of Education ("Birmingham") agreed when it accepted federal funds. Although coaches (like educators generally) need protection from unwarranted retaliation, schools need protection from unwarranted and premature litigation.

Patterned on Title VI of the Civil Rights Act of 1964, Title IX broadly provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

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[2] Albert Bigelow Paine, ed., *Letters Vol. 4: Mark Twain's Letters 1886-1900*, at 93 (2003) (letter to Rev. J. H. Twichell, Hartford, Conn. (June 17, 1898)).

In applying this text to the retaliation regulation at issue here, *amicus curiae* CSC makes three arguments:

1. Absent the retaliation regulation, a plaintiff could not credibly argue that Title IX prohibits retaliation for advocacy on behalf of a third party's statutory or regulatory rights.

2. When a plaintiff relies upon a regulation to establish a violation, that regulation must "effectuate" Title IX's statutory prohibition against intentional gender-based discrimination before it will support a private right of action.

3. Even if a regulation so effectuates Title IX, however, third-party beneficiaries cannot enforce Spending-Clause legislation like Title IX unless they comply with the *entire* regulatory process that creates the regulatory prohibition that they seek to enforce.

Under the foregoing framework, *some* hypothetical plaintiff could bring a private right of action to enforce the regulatory provision against retaliation. As detailed below, the application of the second argument to this case presents a compounded series of close questions. At any rate, unless he initiated the required administrative process, Coach Jackson cannot bring a private right of action for retaliation under Title IX.

FACUTAL AND LEGAL BACKGROUND

Amicus curiae CSC adopts the facts presented in the Eleventh Circuit's decision, 309 F.3d at 1335-36, but highlights here only that – although ¶ 2 of the Amended Complaint alleges fulfillment of all conditions precedent to

his filing suit – it appears that Coach Jackson did not file an administrative complaint, that no responsible U.S. Department of Education ("DE") official has determined that Birmingham's compliance could not be secured by voluntary means, and that Birmingham did not receive the requisite pre-litigation notice of its failure to comply and the action to be taken to effect compliance. *Cf.* 45 C.F.R. § 80.8(a), (d) (regulatory preconditions to effect compliance "by any other means authorized by law"); 34 C.F.R. § 100.8(a), (d) (same).

Congress enacted Title IX (and related civil rights statutes such as Title VI that place anti-discrimination conditions on federal funds) under the Spending Clause. *See Davis v. Monroe County Board of Education,* 526 U.S. 629, 640 (1999) (*citing* cases). By contrast, Congress enacted Title VII under the Commerce Clause and § 5 of the Fourteenth Amendment. *Fitzpatrick v. Bitzer,* 427 U.S. 445, 458 (1976) (Brennan, J., concurring) (citing cases).

Unlike Title VI and IX, Title VII expressly prohibits retaliation. 42 U.S.C. § 2000e-3(a). Nonetheless, both Title VI and Title IX authorize federal funding agencies to issues rules, regulations, and orders of general applicability "to effectuate" their respective statutory prohibitions against intentional discrimination. 42 U.S.C. § 2000d-1; 20 U.S.C. § 1682. Under both Title VI and Title IX, such rules, regulations, and orders do not take effect unless and until approved by the President, 42 U.S.C. § 2000d-1; 20 U.S.C. § 1682, with presidential approval manifested by a signature in the *Federal Register. See* 110 Cong. Rec. 2499 (1964) (Rep. Lindsay). Executive Order 12,250 delegated the President's rule-approval and enforcement authority to the Attorney General, 45 Fed. Reg. 72,995 (1980), who in turn delegated the enforcement authority, but not the rule-

approval authority, to the Assistant Attorney General in charge of the Department of Justice's Civil Rights Division. 46 Fed. Reg. 29,704 (1981) (*codified at* 28 C.F.R. § 0.51(a)).

Consistent with this Title VI heritage, the initial Title IX regulations by the Department of Health, Education & Welfare ("HEW") incorporate HEW's Title VI regulations, which prohibit recipients' retaliating for two types of actions: (a) interference with a *statutory* right or privilege, and (b) participation in a *regulatory* investigation, proceeding, or hearing. 40 Fed. Reg. 24,128, 24,144 (1975) (*codified at* 45 C.F.R. § 86.71); 29 Fed. Reg. 16,299, 16,301 (1964) (*codified at* 45 C.F.R. § 80.7(e)). Upon its formation as a separate agency, the Department of Education ("DE") promulgated in Title 34 of the Code of Federal Regulations the education-related provisions of the HEW regulations. 45 Fed. Reg. 30,802 (1980) (invoking the 5 U.S.C. § 553(b)(B) "good-cause" exemption not to undertake notice-and-comment rulemaking for its repackaging the HEW regulations as its own).

Both the former HEW regulations and the new DE regulations continue to include the relevant provisions. 45 C.F.R. §§ 80.7(e), 86.71 (2003); 34 C.F.R. §§ 100.7(e), 106.71 (2003). In addition, in 2000, twenty-one federal agencies (including the Department of Justice) issued Title IX regulations that include similar provisions. *See* 65 Fed. Reg. 52,858 (2000). Presidents Johnson and Ford signed the HEW regulations. 29 Fed. Reg. at 16,303; 40 Fed. Reg. at 24,137. President Carter did not sign the DE regulations. 45 Fed. Reg. at 30,803. With the exception of the Department of Justice's regulations in 2000, 65 Fed. Reg. at 52,880, no Attorney General has signed Title IX regulations.

ARGUMENT

I. *WITHOUT THE REGULATIONS,* THERE IS NO PRIVATE RIGHT AGAINST RETALIATION

If Birmingham's alleged retaliation violated Section 901(a), then Coach Jackson has an implied private right of action, without exhausting his administrative remedies. *See Cannon v. University of Chicago,* 441 U.S. 677, 689 (1979). The first task, therefore, is to define the scope of Title IX's statutory prohibition and to determine whether retaliation falls within that scope.

Whatever the *regulatory* requirements imposed on recipients, Title IX's *statutory* prohibition clearly covers only intentional, gender-based discrimination. *See Alexander v. Sandoval,* 532 U.S. 275, 282 & n.2 (2001) ("it is absurd to think that *Cannon* meant, without discussion, to ban under Title IX the very disparate-impact discrimination that *Bakke* said Title VI permitted"); *Cannon,* 441 U.S. at 748 n.19 (Powell, J., dissenting) (Title IX's limitation to intentional discrimination "seems forgone" in light of the *Bakke* holding on Title VI). As borne out by its reliance on the Title VI template,[3] Title IX proscribes the same intentional (*i.e.,* purposeful) discrimination that Title VI and the Equal Protection Clause prohibit, *United States v. Fordice,* 505 U.S. 717, 732 n.7 (1992) (protection is coextensive with that of the Fourteenth Amendment), namely where "the decisionmaker . . . selected or reaffirmed a particular course of action at least in part *'because of,'* not merely *'in spite of,'* its adverse effects upon an identifiable group." *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 279 (1979) (footnote and citations omitted, emphasis added); *cf.* Catharine A. MacKinnon, "Disputing Male Sovereignty: On United States v. Morrison," 114 HARV. L. REV. 135, 149-50 & n.85 (2000) (for "constitutional sex equality oversight," Supreme Court requires that "discrimination under the Fourteenth Amendment be intentional").

When it enacted the Civil Rights Act of 1964 (*i.e.,* Titles VI and VII), Congress expressly included retaliation only in Title VII. 42 U.S.C. § 2000e-3(a). Standing alone, such selective omissions and insertions within the same statute suggest that Congress intentionally and purposefully omitted retaliation protections from Title VI. *Russello v. United States,* 464 U.S. 16, 23 (1983). Significantly, although it generally patterned Title IX on Title VI, Congress borrowed one provision – unrelated to the issues before the Court – from Title VII. *Compare* 42 U.S.C. § 2000e-2(j) (Title VII) *with* 20 U.S.C. § 1681(b) (Title IX). If there was any doubt, Congress clearly knew how to include Title VII provisions in Title IX when it intended to do so.

In *Sullivan v. Little Hunting Park, Inc.,* 396 U.S. 229 (1969), decided between the enactment of Title VI and Title IX, this Court allowed a Caucasian landlord to maintain a suit against a private park-management corporation that retaliated against him and discriminated against his African-American lessee. 396 U.S. at 236-37. In doing so, the Court interpreted a different statute, 42 U.S.C. § 1982, which Congress enacted under different authority that Title IX, the power to enforce the Thirteenth Amendment. *See Jones v.*

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[3] *Compare* 20 U.S.C. § 1681(a) *with* 42 U.S.C. § 2000d; *see North Haven Bd. of Educ. v. Bell,* 456 U.S. 512, 529 (1982) (interpret Title IX in *para materia* with parallel provisions of Title VI).

Alfred H. Mayer Co., 392 U.S. 409, 413 & n.5 (1968). Significantly, courts most frequently cite *Little Hunting Park* as a third-party standing case, in which the landlord has standing to assert the equal-protection rights of his lessee. *See, e.g., Craig v. Boren*, 429 U.S. 190, 195 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 263-64 (1977). While important, this principle does not support of free-standing protection from retaliation, whether or not the direct victim supports its advocate's advocacy. *Cf.* 45 C.F.R. § 81.12 ("Any individual acting in a representative capacity in any proceeding may be required to show his authority to act in such capacity"); 34 C.F.R. § 101.12 (same).

The authorities that counsel for interpreting Title IX to include third-party advocacy protections involve other statutory schemes, adopted without the Spending Clause's need for unambiguous congressional notice to the federal recipient of the terms of its bargain with the federal government. *Barnes v. Gorman*, 536 U.S. 181, 186 (2002). Further, although those cases construe statutes under Congress' more generous remedial powers (*e.g.*, the Equal Protection Clause, the Thirteenth Amendment), they are at bottom cases of statutory construction. Each lacks the clear *Russello* inference that the Civil Rights Act of 1964 provides: namely, Title VII has a retaliation provision, and Title VI does not. By choosing a Title VI template for Title IX, Congress thus omitted statutory retaliation protections. Given this basic statutory difference, Coach Jackson cannot argue that Congress would have expected the Court to interpret Title IX in light of *Little Hunting Park*. *See*

Sandoval, 532 U.S. at 288 (rejecting such the "contemporary legal context" argument).[4]

In its *amicus curiae* brief support of Coach Jackson's petition for *certiorari* (hereinafter "U.S. Br."), *amicus curiae* United States cites testimony from 1970 hearings on the prevalence of retaliation against women in academia. *See* U.S. Br. at 8-9 n.1. Although the hearings chronicle significant wrongs, they do not approach the retaliation against African Americans in the period leading up to the enactment of the Civil Rights Act of 1964. *See* Diane McWhorter, *Carry Me Home: Birmingham, Alabama - The Climactic Battle of the Civil Rights Revolution, passim* (2002). If, on that record, Congress could omit retaliation protections from Title VI of the Civil Rights Act of 1964, it certainly could omit them from Title IX of the Education Amendments of 1972.

For all the foregoing reasons, CSC submits that – if no Title IX regulations existed – a would-be plaintiff could not

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[4] In a somewhat oblique way, this Court already has concluded that retaliation protections are not the same right as the underlying equal-protection right. *See Great American Federal Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 387-88 (1979) ("Clearly [the] right under § 704(a) – to be free from retaliation for efforts to aid others asserting Title VII rights –is distinct from the Title VII right [of] employees not to be discriminated against on the basis of their sex") (White, J. dissenting). Writing for himself and Justices Brennan and Marshall, Justice White dissented from the majority's resolution of the question there presented: namely, the availability of relief under 42 U.S.C. § 1985(3). 442 U.S. at 385-86. Had it considered the plaintiff-advocate to have a right under Title VII, presumably the majority would not have ruled for the defendant.

credibly assert an implied private right of action against a federal recipient to protect his or her advocacy on behalf of third parties.

II. *IF THEY FOLLOW THE REGULATIONS,* EDUCATORS *MAY* HAVE A PRIVATE RIGHT

As this Court recognized in *Sandoval,* substantive agency regulations fall into two categories: (1) those that authoritatively construe statutory terms (and thus *statutory* rights), and (2) those that extend to conduct that the underlying statute does not reach. The first category is as privately actionable as the underlying statute, 532 U.S. at 284 ("Such regulations, if valid and reasonable, authoritatively construe the statute itself[,] and it is therefore meaningless to talk about a separate cause of action to enforce the regulations apart from the statute"), but the second category cannot support a private action at all. 532 U.S. at 291 ("Agencies may play the sorcerer's apprentice but not the sorcerer himself"). If the retaliation regulation is valid, applies by its terms to the facts here, and falls into the first category, the Court should remand for further proceedings. If, however, the regulation falls into the second category, the Court should affirm the dismissal.

This section undertakes to classify the retaliation regulation into the appropriate one of those two categories. Assuming *arguendo* both that the Court concurs with CSC that the statute lacks a private retaliation action *in the absence of a regulation* (Section I, *supra*) and that the Court will not overrule *Sandoval,* this classification exercise represents the primary question raised by this litigation to date. Before classifying the retaliation regulation, however, CSC first must analyze the judicial deference owed to it.

A. Title IX Regulations Warrant *Skidmore* – Not *Chevron* – Deference

In its brief in support of *certiorari, amicus curiae* United States posits that DE's regulations warrant deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984). U.S. Br. at 10. Because the weaker deference under *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944), should apply, *amicus curiae* CSC analyzes the deference appropriate to DE's (or any other agency's) Title IX regulations, rules, or orders of general applicability.

Under the separation-of-powers principles that underlie *Chevron,* courts owe deference to an agency's construction of a statutory scheme that Congress charged the agency to administer. *Chevron,* 467 U.S. at 843-44, 865-66. Indeed, under such a grant of authority, an agency's regulation issued to fill a statutory gap is binding on the courts, unless procedurally defective, arbitrary and capricious in substance, or manifestly contrary to the statute. *Chevron,* 467 U.S. at 844. Consistent with this underlying principle, this Court routinely has deferred to agencies acting within the permissible scope of delegated authority in both the civil rights[5] and general administrative[6] contexts.

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[5] In *Trafficante v. Metropolitan Life Insurance Co.,* 409 U.S. 205, 210 (1972), the Court accorded "great weight" to a "consistent administrative construction" of the Civil Rights Act of 1968, in which Congress delegated "authority and responsibility for administering this Act [to]the Secretary of Housing and Urban Development." 42 U.S.C. § 3608(a). Similarly, the Supreme Court held that guidelines issued by the Equal Employment Opportunity Commission ("EEOC") were entitled to great deference, *Griggs v. Duke Power Co.,* 401 U.S. 424, 433-34

(Footnote cont'd on next page)

By contrast, in the absence of delegated authority justifying *Chevron* deference, an agency regulation lacks the force and effect of law to bind the courts, and instead receives only the deference warranted by:

> the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking power to control.

United States v. Mead Corp., 533 U.S. 218, 227-28 (2001) (*quoting Skidmore*, 323 U.S. at 140); *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) (same). While the retaliation regulation

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(Footnote cont'd from previous page.)

(1971), in a context in which Congress delegated enforcement authority and rulemaking authority *specifically to EEOC*. *See* 42 U.S.C. §§ 2000e-5, 2000e-12. In *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 280-81 (1969), the Court indicated that it would sustain the Secretary of Housing and Urban Development's interpretation if "reasonably related to the purposes of the [United States Housing Act]," in which Congress authorized the Secretary to "make, amend, and rescind such rules and regulations [necessary to] carry out the provisions of this Act." Pub. L. No. 93-383, Title II, § 8; 50 Stat. 653, 891 (1937) (*recodified* at 44 U.S.C. § 3535(d)).

[6] In *Udall v. Tallman*, 380 U.S. 1, 17 (1965), the Court deferred to an agency order issued under an Executive Order that the President had delegated to the agency to implement and revise. *See also Mourning v. Family Publication Services, Inc.*, 411 U.S. 356, 369 (1973), in which the Court deferred to the Federal Reserve Board's interpretation of the Truth in Lending Act, in which Congress authorized the Board to "prescribe regulations to carry out the purposes of this subchapter." 15 U.S.C. § 1604(a).

represent a consistent position since 1964, HEW appears to have simply inserted its Title VI provision into its Title IX program, without considering the First Amendment issues raised by Title IX. As discussed in Section II.B, *infra*, however, these factors counsel against deference.

1. Education Amendments of 1972

At the outset, because Title IX merely implements the constitutional standard against intentional discrimination, this Court has no reason to defer to an agency's expertise. With education protected by the First Amendment, *Grutter v. Bollinger*, 539 U.S. 306, 328-29 (2003), and traditionally regulated by the states and localities, *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968), this Court should require either a clear constitutional violation or unambiguous congressional statement before ratifying an agency's encroaching into a school's otherwise constitutional prerogatives. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001) (clear congressional statement required to upset the state-federal balance in areas of traditional state or local control).[7]

As explained below, moreover, Congress expressly and intentionally provided not HEW but *each agency* the

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[7] *See also N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-500 (1979); *Bowen v. American Hospital Association*, 476 U.S. 610, 643-44 (1986) (plurality) ("Congress therefore 'will not be deemed to have significantly changed the federal-state balance" – *or to have authorized its delegates to do so* – 'unless otherwise the purpose of the Act would be defeated') (citations omitted, emphasis added); *Raygor v. Regents of University of Minnesota*, 534 U.S. 533, 543-44 (2002).

authority to issue Title IX rules, regulations, and orders, 20 U.S.C. § 1682, and such multi-agency delegations trigger the weaker *Skidmore* deference. *Bragdon v. Abbott*, 524 U.S. at 642; *Mead Corp.*, 533 U.S. at 227-28; *Bowen v. American Hospital Association*, 476 U.S. at 643 n.30; Moreover, with regulatory authority only to effectuate the intentional-discrimination provisions of 20 U.S.C. § 1681(a), Title IX has nothing like the Clean Air Act's broad delegation in *Chevron*. *Compare* 20 U.S.C. § 1682 (authorizing agencies to issue regulations to effectuate the intentional-discrimination standard of § 1681(a)) *with* 42 U.S.C. § 7601(a)(1) ("The Administrator [of the Environmental Protection Agency] is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter").

Finally, the legislative path through which Congress arrived at Title IX's regulatory delegation further demonstrates that Congress did not delegate special interpretative authority to HEW. Senator Bayh's 1971 proposed amendment (which did not pass) explicitly delegated rulemaking authority only to the Secretary of HEW. 117 Cong. Rec. 30,399, 30,404 (1971) (Amendment 398); *accord* at *id.* at 30,407 (Sen. Bayh). Senator Bayh's 1972 amendment (which passed and became Title IX) delegates rulemaking authority to *all* federal agencies that dispense federal funds. 118 Cong. Reg. 5803 (1972) (Amendment 874) "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citation omitted). Because Congress purposefully replaced the

Secretary of HEW with "each agency," Title IX clearly did not grant any special authority to HEW.

2. Education Amendments of 1974

During the Senate's consideration of the Education Amendments of 1974, Senator Tower introduced an amendment to exempt revenue-producing intercollegiate athletics from Section 901(a) and to require the Commissioner of Education to publish proposed Title IX regulations within 30 days. 120 Cong. Rec. 15,322-23 (1974) (Amendment 1343). In doing so, he stated that his review of the legislative history indicated that Title IX did not extend to athletics, but offered his amendment merely to clarify that – if a court found Title IX to apply to athletics – it would not apply to revenue-producing sports. *Id.* at 15,323. He further stated that, the requirement that the Commissioner publish proposed rules was "not intended to confer on HEW any authority it does not already have under the act." *Id.*

The Conference Committee amended the "Tower Amendment" – in the process, rechristening it the "Javits Amendment"[8] – to amend the athletics provision and to require the HEW Secretary (in place of the Commissioner of Education) to publish the proposed regulations. *Compare* H.R. 69, § 536 (Tower Amendment), *reprinted in* 120 Cong. Reg. 15,444, 15,477 (1974) *with* Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974) (Javits Amendment). The Conference Report indicates that the conference substitute

[8] *See* 40 Fed. Reg. 24,128, 24,134 (1975) (referring to the conference amendment the "Javits Amendment").

adopts the Senate's rulemaking provision, but modifies the athletics provision.[9] Conf. Rep. 93-1026, *reprinted in* 1974 U.S.C.C.A.N. 4206, 4271. The Conference Committee gave no indication that it made any other changes. *Id.*

Because it is axiomatic that an agency has no authority beyond that expressly delegated to it, *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 208 (1988), and that judicial deference applies only when the agency acts within the scope of its delegation, *Chevron*, 467 U.S. at 865, the Javits Amendment provides no justification for deference. First, the Javits Amendment directs the Secretary of HEW to issue not a *final* rule, but merely a *proposed* rule, which as such commands no deference.[10] Second, assuming *arguendo* that it confers authority, the Javits Amendment confers only the one-time authority to issue a proposed rule within 30 days of the enactment of the Education Amendments of 1974. As such, courts would owe any deference only to HEW's 1974 proposal, not to HEW's 1975 final rule or to any agencies'

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[9] Specifically, the Javits Amendment replaced the exemption for revenue-producing sports with a requirement that the proposed regulations "include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports." Pub. L. No. 93-380, § 844, 88 Stat. at 612.

[10] *See, e.g., Public Citizen, Inc. v. Shalala*, 932 F.Supp. 13, 18 n.6 (D.D.C. 1996) (*citing Public Citizen Health Research Group v. Commissioner, Food & Drug Administration*, 740 F.2d 21, 32-33 (D.C.Cir.1984)) (proposed rules does not warrant deference); *Matter of Appletree Markets, Inc.*, 19 F.3d 969, 973 (5th Cir. 1994) ("inappropriate to defer to proposed regulations"); *Utah Wilderness Alliance v. Dabney*, 222 F.3d 819, 829 (10th Cir.2000) (non-final agency policies not entitled to *Chevron* deference).

subsequent actions, proposed or final. Unlike the congressional delegation of legislative authority to an executive agency under *Chevron*, such temporary, special-circumstance delegations do not elevate the delegate. *Cf. United States v. Eaton*, 169 U.S. 331, 343 (1898) ("Because the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions he is not thereby transformed into the superior and permanent official").

In short, the Javits Amendment is nothing like the broad delegation of rulemaking authority at issue in *Chevron*. To the contrary, far from granting new authority, the Javits Amendment merely prods a recalcitrant agency to carry out the first step of a rulemaking process that Title IX already authorized and *directed* HEW (and every other agency) to take. *See* 20 U.S.C. § 1682.

3. Congressional Acquiescence

When HEW issued the initial Title IX regulations in 1975, it submitted them to Congress pursuant to the "laying before" process of the General Education Provisions Act, 20 U.S.C. § 1232, then in effect. *See North Haven*, 456 U.S. at 533-34. Notwithstanding the general unreliability of post-enactment legislative history and congressional inaction, *e.g., Brown v. Gardner*, 513 U.S. 115, 121 (1994) (Congressional inaction frequently results from *inter alia* "paralysis"), when this Court subsequently upheld the Title IX employment regulations, it found Congress' passive acquiescence to bolster the view that the regulations correctly interpreted congressional intent. *North Haven*, 456 U.S. at 533-34. Because the Court did not recognize an implied private right of action until 1979, however, and has never addressed the

issue here (namely, whether a regulatory limitation on a regulatory right is jurisdictional), congressional acquiescence cannot serve as a reliable indicator of congressional intent in this case.

4. Department of Education Organization Act

Assuming *arguendo* that Title IX or the Javits Amendment conferred *any* unique authority on HEW or the HEW Secretary, DE nonetheless cannot lay claim to that authority. In splitting HEW into DE and the Department of Health & Human Services ("HHS"), the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 668 (1979) ("DEOA") reserved to HHS all functions not transferred to Education. 20 U.S.C. § 3508(b). As explained below, DEOA did not transfer either Title IX or the Javits Amendment. Consequently, one of two situations applies: (1) as inheritor of all non-transferred HEW authority, HHS is the Title IX czar, or (2) consistent with their plain language and legislative histories, neither Title IX nor the Javits Amendment confer any interpretive authority on HEW, HHS, DE, or any other agency.

DEOA Section 301 transferred "functions" from HEW and its officers to DE and its officers. *See* 20 U.S.C. § 3441(a)(1)-(6), (b). Subsections 301(a)(1), (a)(5), (a)(6), and (b) transfer functions of various education-related subordinate officers, offices, and councils within HEW, which by their terms do not address either HEW's Title IX authority or the HEW Secretary's Javits Amendment authority. Likewise, Subsection 301(a)(4) transferred HEW functions under the Rehabilitation Act of 1973 and certain HEW functions administered by the Commissioner of Rehabilitation Services. And Subsection 301(a)(2) transferred all HEW functions under seventeen enumerated statutes, which do not include either Title IX or the Javits Amendment. *Compare* 20 U.S.C. § 3441(a)(2) (list of transferred functions) *with* 20 U.S.C. § 1682 (Title IX rulemaking authority) *and* Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974) (Javits Amendment).

The only potentially relevant subsection, Subsection 301(a)(3),[11] transferred "all [HEW] functions with respect to or being administered by the [HEW] Office of Civil Rights *which relate to functions transferred by this section.*" 20 U.S.C. § 3441(a)(3). Because it applies only to "functions transferred by this section," it does not include rulemaking authority under Title IX or the Javits Amendment, which Section 301 did not transfer. Further, as distinct from enforcement authority, HEW's *rulemaking authority* was administered by the *HEW Secretary,* and thus was not "being administered by the Office of Civil Rights," as required for Subsection 301(a)(3) to apply.[12]

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[11] In *dicta* without analysis, this Court indicated that Subsection 301(a)(3) transferred Title IX authority to the newly created DE. *North Haven,* 456 U.S. at 516 n.4. *North Haven* involved litigation commenced against HEW but completed against DE, and the cited footnote explains the Court's convention to refer to the government party as "HEW." *Id.* Although it did not matter whether HHS or DE defended the employment regulations in *North Haven, amicus curiae* CSC respectfully submits that the *North Haven dicta* misstates the impact of Subsection 301(a)(3).

[12] Had the DEOA transferred the HEW Office of Civil Rights to DE, as the Senate Bill proposed, one could make a strained argument that Subsection 301(a)(3)'s "relates-to" clause includes any "function" related to any authority wielded by that Office. But the Senate receded to the House in Conference, and the DEOA created a new Office of Civil Rights

(Footnote cont'd on next page)

In sum, nothing in Section 301 or elsewhere in the DEOA transfers rulemaking authority to DE. Instead, like any other agency, DE draws its rulemaking authority from Title IX itself, which authorizes and directs *each* federal agency to issue Title IX regulations. 20 U.S.C. § 1682. Thus, under this authority, DE issued regulations upon its formation in 1980, 34 C.F.R. pt. 106, while HHS retained the original HEW regulations, 45 C.F.R. pt. 86.

B. Regulations that *Define* Statutory Terms

As indicated above, *Sandoval* recognized that authoritative regulations that construe statutory terms are enforceable to the same extent as the underlying statute. 532 U.S. at 284; *see also Wright v. City of Roanoke Development & Housing Authority,* 479 U.S. 418, 419-23 (1987). Thus, for example, if the retaliation regulation defines "discrimination" as used in Section 901(a), an appropriate plaintiff could enforce the regulation under the implied private right of action to enforce Section 901(a).[13]

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within DE instead of transferring HEW's Office of Civil Rights. *See* H.R. Conf Rep. 96-459, 46-47, *reprinted in* 1979 U.S.C.C.A.N. 1612, 1626; 20 U.S.C. § 3413 (creating DE's Office of Civil Rights). Thus, the strained argument is neither availing nor available.

[13] In support of the petition for *certiorari, amicus curiae* United States claimed that the Department of Education's Office of Civil Rights' policy guidance on sexual harassment demonstrates an agency view that Title IX (the statute) prohibits retaliation. *See* U.S. Br. at 10. The off-hand discussion in that document fails to distinguish between (1) Section 901(a) itself, and (2) "Title IX" writ large as the totality of the Title IX

(Footnote cont'd on next page)

Amicus curiae CSC is not aware of any contemporaneous documents that indicate that HEW intended its retaliation regulation *to define* Section 901(a), as distinct from issuing a procedural rule *to effectuate* that section.[14] 20 U.S.C. § 1682. Because an agency action can be upheld only on the basis that the agency articulated, *Motor Vehicle Ass'n v. State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29, 50 (1983), it appears unlikely that Coach Jackson (or even DE) now could claim that the retaliation regulation defines Section 901(a).

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regulatory regime. *See* 62 Fed. Reg. 12,034, 12,044 (1997) ("because retaliation is prohibited by Title IX, schools may want to include a provision in their procedures prohibiting retaliation against any individual who files a complaint or participates in a harassment inquiry"). As such, the document simply begs the question: namely, which prohibits retaliation, the statute or the regulation? At any rate, no rule, regulation, or order of general applicability takes effect until signed by the President, 20 U.S.C. § 1682, 110 Cong. Rec. 2499, or – since 1980 – by the Attorney General, 46 Fed. Reg. at 29,704. Because it qualifies as an interpretive "rule" or "order" of general applicability, 5 U.S.C. § 551(4); *FTC v. Standard Oil Co. of California,* 449 U.S. 232, 238 n.7 (1980) ("order" means "the whole or a part of a final disposition . . . of an agency in a matter other than rule making"), DE's failure to comply with 20 U.S.C. § 1682 renders the document immaterial to this or any other litigation.

[14] The elimination of gender discrimination constitutes a matter of public concern about which public employees would have First Amendment rights "to speak out freely . . . without fear of retaliatory dismissal." *Pickering v. Board of Ed. of Township High School Dist. 205,* 391 U.S. 563, 572 (1968); *Connick v. Myers,* 461 U.S. 138, 149 (1983) (same). The viability of Coach Jackson's asserting a First Amendment claim is not before this Court.

Even if the retaliation regulation authoritatively construes Title IX, however, Coach Jackson may not have a private right of action for at least three reasons. First, it is not at all clear that his amended complaint states a claim under the retaliation regulation. Second, accepting that a *valid* regulation could authoritatively construe Title IX to prohibit certain retaliatory acts, the retaliation regulation here appears invalid. Third, as indicated in Section III, *infra,* Coach Jackson's apparent failure to meet the *regulatory* preconditions for bringing suit would foreclose a private right of action created by regulation.

By its terms, the retaliation regulation protects only two types of activity: (1) statutorily protected activity, and (2) participation in a regulatory enforcement proceeding. 45 C.F.R. § 80.7(e); 34 C.F.R. § 100.7(e).[15] Without a regulatory proceeding, Coach Jackson must allege a statutory violation in order to fall under the terms of the retaliation regulation.

In ¶ 7 of his amended complaint, Coach Jackson alleges that he advised his supervisor of "gender discrimination" against his team, his team's being prohibited from using various equipment including a locked "sports facility" to which his team lacked a key, and "serious infractions" regarding unspecified "expense accounts." In his petition for *certiorari,* Coach Jackson clarifies that his "girls' team was

[15] Because no President before 1980 and no Attorney General since 1980 has signed the DE regulations, those regulations have not yet taken effect. 20 U.S.C. § 1682. Because the DEOA's savings clause continues the HEW regulations (*i.e.,* the HHS regulations) in effect until DE modifies them, 20 U.S.C. § 3505(a), *amicus curiae* CSC cites the current HHS regulations as well as the DE regulations.

denied equal funding and equal access to athletic equipment and facilities." Pet. for Cert. at 3.

As clarified, Coach Jackson nevertheless still has not asserted a claim for intentional gender-based discrimination (*i.e.,* actions taken *because of* gender, as opposed to in spite of it). Although one perhaps could infer a "disparate-treatment claim," such a claim "requires proof of a discriminatory purpose," *Teamsters v. United States,* 431 U.S. 324, 335-336, n. 15 (1977), which the amended complaint does not allege. Further, standing alone, with no allegation of intentional discrimination, disparate funding is not a regulatory violation, 45 C.F.R. § 84.41(c) ("unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section"), 34 C.F.R. § 106.41(c) (same), much less a statutory violation.

Further, the retaliation regulation appears to create a strict-liability regime for any action to "intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by" Section 901(a). 45 C.F.R. § 80.7(e); 34 C.F.R. § 100.7(e). In the First-Amendment context, however, this Court has allowed a government actor to avoid liability for retaliation or discrimination by proving that it would have made the same decision without the impermissible motive. *Texas v. Lesage,* 528 U.S. 18, 21 (1999). In a related First Amendment context, the Court deemed invalid a National Labor Relations Board standard for imposing liability on retaliatory lawsuits that were unsuccessful, but nonetheless also reasonably based. *BE & K Const. Co. v. N.L.R.B.,* 536 U.S. 516, 535-37 (2002). Under this admittedly cursory analysis, it appears

likely that the Title IX retaliation regulation is overbroad and thus invalid.

C. Regulations that *Expand* on Statute

In *Sandoval*, this Court held that regulations that expand on the statutory prohibition could not form the basis for a private right of action. 532 U.S. at 291. Although *Sandoval* involved a regulatory disparate-impact standard, and this case involves a regulatory prohibition against an intentional act (namely, retaliation), that is a distinction without a difference. To the extent that an agency's regulation expands upon a statutory provision, the regulation cannot support a private right of action. 532 U.S. at 291. This case presents no reason to reverse *Sandoval*.

III. SPENDING-CLAUSE LEGISLATION CANNOT IMPOSE LIABILITY WITHOUT NOTICE

This Court analogizes Spending-Clause programs to a contract struck between the government and recipients, with the public as third-party beneficiaries. *Gorman*, 536 U.S. at 186. To impose conditions on recipients, Congress must express statutory conditions unambiguously. *Id.* Provided it receives that notice, the recipient becomes subject to enforcement for intentional violations of the statute, either by the government or by the injured public. 536 U.S. at 187-89.

In *Cannon*, this Court held that the victim of statutory discrimination could bring her implied statutory right of action without first exhausting administrative remedies. 441 U.S. at 687-89 & n.8 (discussing history of HEW interpretations regarding exhaustion of administrative remedies). But just as *Sandoval* confined *Cannon* to implied rights of action for statutory discrimination, this case should

confine the *Cannon* to omitting exhaustion requirements only for statutory discrimination.

By contrast, when a regulation creates the provision being enforced, the regulation's other components are an integral part of the bargain that the third-party beneficiary would enforce. In other words, to ensure the notice required for Spending-Clause litigation, the third-party beneficiary must comply with the regulatory preconditions to suit. *See* 45 C.F.R. § 80.8(a), (d) (requiring administrative complaint, review by DE officials, and pre-litigation notice); 34 C.F.R. § 100.8(a), (d) (same). Rather than "cherry pick" from among the regulations to enforce, "under traditional principles of contract interpretation, . . . third-party beneficiaries generally have no greater rights in a contract than does the promise." *United Steelworkers of America, v. Rawson*, 495 U.S. 362, 375 (1990) citations omitted).

Had Coach Jackson filed an administrative complaint before this lawsuit, the parties may have settled without the burden and expense of litigation. If education generally and sports particularly continue to exact high litigation costs, schools may become reluctant (or even unable) to offer such non-core programs, no matter how invaluable to students. Perhaps worse, the fear of such awards could chill schools' First Amendment autonomy. If, contrary to the allegations in his amended complaint (¶ 2), Coach Jackson failed to satisfy all conditions precedent to bringing suit, this Court should give Birmingham the benefit of its bargain: namely, no litigation exposure without the regulatory compliance process.

CONCLUSION

To dispose of the case before it, the Court could apply any of several narrow theories. Alternatively, the Court expansively could address the issues raised here, remanding if necessary to determine whether Coach Jackson's action can survive. Whatever the disposition, *amicus curiae* CSC respectfully submits that an expansive ruling will best serve educational institutions and educators alike, and thus the end-users of education: the students.

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Respectfully submitted,

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